82-629

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION, Petitioners,

v.

WOLD ENGINEERING, P.C.,
A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent.

v.

SCHMIDT, SMITH & RUSH, Respondent

PETITION FOR A WRIT OF CERTIORARI FROM NORTH DAKOTA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Did the State Trial Court have jurisdiction to hear and decide a cause of action brought by a federally recognized Indian Tribe against a Non-Indian Defendant regarding a matter arising within the exterior boundaries of the Indian Reservation?

PARTIES TO ACTION

The Parties to this Appeal and who have an interest in its outcome are:

Petitioner - Three Affiliated Tribes

Respondents - Wold Engineering, P.C. and Schmidt, Smith & Rush (did not participate in lower appeal but has interest in action)

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REPORT OF OPINIONS BELOW

On January 18, 1982, the State District Court issued an unreported opinion dismissing Petitioners action for lack of Jurisdiction. (See Appendix A, *infra*). Petitioners filed an appeal to the North Dakota Supreme Court for review of that decision on February 23, 1982. (See Appedix B, *infra*). On July 23, 1982 the North Dakota Supreme Court affirmed the District Court's decision of Judgment of Dismissal. The North Dakota Supreme Court's decision is reported at 321 N.W.2d 510 (N.D. 1982). (See Appendix C, *infra*).

Appeal is taken from the decision of the North Dakota Supreme Court.

JURISDICTIONAL GROUNDS

The date of the Judgment of the North Dakota Supreme Court affirming the District Court's Judgment of Dismissal was entered on July 23, 1982.

Jurisdiction of this Court to review the July 23, 1982, Judgment is conferred by 28 USC § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved in the case are:

U.S. **Const.**, Art. 1 § 8, cl 3:

> (The Congress shall have Power) To regulate Commerce with Foreign Nations, and among the several states, and with Indian Tribes;

14th *Amend.*, U.S. **Const.**, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision involved in this action is 24 USC 1322 (a):

> Assumption by State of civil jurisdiction — Consent of United States; force and effect of civil laws
>
> (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any and all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

STATEMENT OF CASE

The Three Affiliated Tribes is a federally recognized Tribe, who is organized under the Indian Reorganization Act, and whose reservation boundaries are those of the Fort Berthold Indian Reservation located within the State of North Dakota.

The Three Affiliated Tribes contracted with Respondent, Wold Engineering, P.C. to design and construct a water intake system from Lake Sakakawea to provide water for the Four Bears Mote, Tribal Administration building and the Four Bears Community located in McKenzie County, North Dakota and all contained within the exterior boundaries of the Fort Berthold Reservation. Respondent, Wold Engineering, P.C., is a professional corporation organized under the laws of the State of North Dakota and whose officers are located outside the exterior boundaries of the Fort Berthold Reservation as is Respondent, Schmidt, Smith & Rush.

Petitioner, Three Affiliated Tribes, accepted upon advice of Wold Engineering, the water intake system. During the winters of 1977 and 1978, the system froze up and became inoperable.

On April 7, 1980, the Three Affiliated Tribes filed action for damages due to negligent design and breech of contract against Respondent, Wold Engineering, P.C. arising out of the malfunctioning of the water system. Wold Engineering, P.C. then brought Schmidt, Smith & Rush in as third party defendant.

On January 12, 1982, the trial upon the merits began. On January 12, 1982, Respondent, Wold Engineering, P.C., moved the trial Court to dismiss Petitioner's complaint for lack of jurisdiction. This was the initial action taken to bring in a federal question. On January 18, 1980, the trial Judge, granted the Motion of Dismissal.

On February 23, 1982, Petitioner filed its Notice of Appeal to the Supreme Court of North Dakota. (Appendix B, *infra*).

On July 23, 1982, the North Dakota Supreme Court entered its affirmation of the District Court's Judgment of Dismissal. (Appendix C, *infra*).

Remittier was entered with the District Court on July 26, 1982.

The Judgment of Dismissal as affirmed by the North Dakota Supreme Court was based upon the Non-acceptance by

the Three Affiliated Tribes pursuant to 25 U.S.C. § 1322 (a) of State Jurisdiction over matters arising within the exterior boundaries of the Fort Berthold Reservation.

REASONS FOR ALLOWING WRIT

The North Dakota Supreme Court decision below holds that an Indian Plaintiff, whether an individual or Tribe, cannot bring an action in State Court against a Non-Indian where the cause of action arose within the exterior boundaries of the Reservation. *Three Affiliated Tribes vs. Wold Engineering, P.C., et. al,* 321 N.W.2d 510 (N.D. 1982). This decision may have significant impact upon Reservation Indians and Tribes. Without access to State Courts, Indian Plaintiffs are left in a jurisdictional nightmare. Important decisions involving off-reservation defendants are abundant; they usually do not involve the necessary requisite for federal jurisdiction. The decision below significantly impairs the ability of Tribes and individuals to contract and do business with non-reservation enities. It also may prohibit enforcement of, for example, educational and welfare benefits, deriving from the State, of which tribes and reservation Indians are entitled and where federal jurisdiction may not exist. The alternative left to tribal governments are either pass jurisdictional statues themselves to bring non-members into Tribal Court or to accept State Jurisdiction uner 25 U.S.C. § 1322 (a). Neither alternative is satisfactory. The first involves Service of Process and Judgment enforcement problems. The second flys in the face of the intent of Section 1322 (a), a free consent to jurisdiction.

The decision in *Three Affiliated Tribes, supra* not only causes significant practical problems but is in direct conflict with the Federal Courts who have addressed this issue. *See Deere vs St. Lawrence River Power Company,* 32 F.2d 550 (C.C.A. 2nd 1929); *United States ex. rel. Standing Bear vs Cook,* 25 *Fed. Cas.* No. 14891 (C.C. Neb. 1879).

Furthermore, it is in conflict with this Court's decision in *Felix vs Patrick,* 145 U.S. 317, 332 (1892) and *United States vs Candelaria,* 271 U.S. 432.

Although these cases predate the Indian Civil Rights Act, (IRCA) 25 U.S.C Section 1322 (a), they give a basis to start with the premise of state jurisdiction in matters involving Indian Plaintiff and Non-Indian Defendants. Subsequent decisions and practice which both predate and postdate the ICRA of this Court are also in direct conflict with the North Dakota Supreme Court's decision in *Three Affiliated Tribes, supra.*

In *Williams vs Lee,* 358 U.S. 217 (1959) this Court determined that a non-Indian could not sue an Indian in State Court over a cause of action arising on the Reservation. However, this Court noted:

> Over the years this Court has modified these principles [*Worcester vs State of Georgia,* 6(Pet) 515 (1832)] in cases where essential tribal relations were not involved and the rights of Indians would not be jeopardized but the basic policy of Worcester has remained. *Thus suits by Indians against outsiders in State Courts have been sustained.*

Williams, supra at 219 (emphasis added) (dictum).

The *Williams* decision predates the ICRA, but its dictum was reaffirmed in further dictum of this Court in the post-ICRA case of *McClanahan vs Arizona Tax Commissioner,* 411 U.S. 164, 171 (1974), *quoting Williams vs Lee* 358 U.S. 217, 219 (1959). *McClanahan, supra* went on: "Indians today are American citizens. They have the right to vote, to use State Courts....." *Id.* at 172-73. The *McClanahan* decision discussed at length the ICRA which this Court apparently felt no barrier to Indian access to State Courts.

It would appear the dictum stating Indians do have access to State Courts was related to the fact that the *McClanahan* case itself involved an Indian Plaintiff suing the Non-Indian off-reservation Defendant in State Court.

Furthermore, a survey of many Indian law cases that have been decided by this Court involved appeals from State Court decisions where a Tribe or Individual Indian Plaintiff sued a non-Indian Defendant regarding causes of action arising within the boundaries of the reservation. *See, e.g., McClanahan,*

supra; Cherokee Nation vs Hitchcook, 187 U.S. 294 (1902) *Bryan vs Itasca County,* 426 U.S. 373 (1976) *White Mountain Apache Tribe vs Bracken,* 100 S. Ct. 2578 (1980).

The decision below is also in conflict with all State Courts of last resort that have addressed this issue. *See McCrea vs Busch,* 524 P.2d 781 (Mont. 1974); *Bad Horse vs Bad Horse* 517 P.2d 893 (Mont) *cert denied* 419 U.S. 847; *State ex rel Iron Bear vs District Court,* 512 P.2d 1292 (Mont. 1973); *Bonnet vs Seekins,* 243 P.2d 317 (Mont. 1952); Begay vs Sawtelle, 53 Ariz. 304, 88 P.2d 999 (1939); *Bradley vs Arizona Corp. Commission,* 60 Ariz. 508, 141 P.2d 524 (1934); *Harrison vs LaVeen,* 67 Ariz. 337, 196 P.2d 456 (1948); *Paiz vs Hughes,* 76 N. Mex. 562, 417 P.2d 51 (1966). *Smith vs Temple,* 82 S.D. 650, 152 N.W.2d 547, 548 (1967).

These decisions whether expressly or implicitely ruled upon those respective states "disclaimer clause" in their enabling act. It should be noted that the enabling legislation for Statehood for North Dakota (Act of Feb. 22, 1889, ch. 180, 25 Stat. 676) has the identical language of all of the States which have ruled upon this question. *See* Act of Feb. 22, 1889, ch. 180, 4 Stat 676 (South Dakota, Washington and Montana); Act of June 20, 1910, ch. 310, §20, 36 Stat. 557 (Arizona); Act of June 20, 1910, ch. 310 § 2, 36 Stat 557 (New Mexico); Act of July 16, 1894, ch. 138, §3, 28 Stat. 107 (Utah). This Court in McClanahan discussed the Arizona Enabling Act.

The North Dakota Supreme Court relied upon its interpretation of the States enabling act and Constitutional provision, §203, N.D. *Const., as amended* in the *Three Affiliated Tribes, supra* decision. Since the enabling legislation of the various states who have ruled on this issue are identical the constitutional provisions may be the only difference. In 1958, as the Court below stated, North Dakota amended its constitution to read as follows:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits

> owned or held by any Indian or Indian Tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress;..."

In 1963 the legislature enacted N.D.C.C ch. 27-19 permitting jurisdiction in state court over matters arising on the Reservation involving Indians "upon acceptance by Indian citizens". N.D.C.C. § 27-19-01. Even though the enabling legislation should be no barrier to access to State Courts in this case, North Dakota has removed any, even remote, impediment.

The Court below based its decision on the fact that the IRCA as interpreted in *Kennerly vs District Court,* 400 U.S. 423 (1971) and N.D.C.C. § 27-19-01 requiring a majority vote of the adult members of the Tribe before acceptance of State jurisdiction is permitted. Reliance upon *Kennerly, supra* was misguided because it involved an Indian defendant being brought into State Court, a situation 25 U.S.C § 1322 (2) was intended to prevent.

The very limited legislative history of 25 U.S.C. § 1322 (a) indicates that Congress was primarily concerned with the foisting of state jurisdiction under P.L. 280 upon individual Indians, the violation of Indian rights by federal, state and local governments, and the lack of consent by the tribal governments. *See hearing on Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess., pt 3, 143, at 769 (1962), (hereafter Senate hearings); *Senate hearings* 86th *Cong.,* 1st Sess. pt 1, at 224 (1961); *See also* 114 **Cong. Rec.** 5838 (1968); *Wounded Head vs Tribal Council,* 507 F.2d 1079, 1082 (8th Cir. 1975). *Poitra vs Demarrias,* 502 F2d 23, 29

(8th Cir, 1974), *cert denied* 421 U.S. 934. No concern was expressed upon voluntary action by Indians to utilize state courts only the involuntary foisting of such courts upon them.

Furthermore, the intent of the ICRA was to protect individual Indians. 24 U.S.C. § 1322 (a). Thus, there is no conflict with a "governing act of Congress". Since there is no "governing act of Congress", the question is, under *Williams vs Lee, supra,* whether bringing the action in State Court infringes upon Tribal self-government. Since there is no foisting of jurisdiction and the fact that the Tribe itself is bringing the action there can be no interference of Tribal self-government.

Also, federal pre-emption analysis traditionally has been used only where affirmative conduct by the State, derived from state statutory or regulatory enactments, which had interferred with Tribal self-government or rights granted or reserved pursuant to federal law. *E.g., Mescalero Apache Tribe vs Jones,* 411 U.S. 145, 148 (1973) (imposition of State use and gross receipts taxes on off reservation tribal ski resort); *Moe vs Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976) (imposition of State Personal Property Tax, Vendor License Fee and Cigarette Sales Tax); *McClanahan, supra* (imposition of State Tax on personal income exclusively derived from reservation sources). *See generally, Jones vs Rath Packing Co.,* 430 U.S. 519 (1977). This approach to federal preemption is entirely on tract with the policy established in *People vs Dibble,* 62 [21 How.] U.S. 366 (1858). In *Dibble* this Court ruled that a state statute passed for the benefit and protection of Indians was not in conflict with the guardian/ward relationship between Reservation Indians and the Federal Government; nor was it pre-empted by the 1802 Intercourse Act, Act of March 30, 1802 (2 U.S.L. 139). The action taken by the North Dakota Courts is not to the benefit of Reservation Indians and is based solely upon the States interpretation of federal law.

Furthermore, to deny access to State Courts by Indian Plaintiffs is contrary to the policy that

> statutes passed for the benefit of dependent Indian Tribes....are to be liberally construed, doubtful ex-

pressions being resolved in favor of the Indians.

Bryan vs Itasca County, 426 U.S. 373, 392 (1976). The ICRA was passed for the benefit of individual Reservation Indians and Tribal governments. The action below denies them a right not expressly pre-empted in the Act. Therefore, statutory interpretation mandates that the access to State Courts in this case not be denied.

In *Bryan, supra,* this Court acknowledged residual jurisdiction in the State over Indian matters upon the following condition:

> In litigation between Indians and Non-Indians arising out of conduct on an Indian Reservation, resolution of conflicts between the Jurisdiction of the State and Tribal Courts has dependence, absent a governing Act of Congress, on "whether the State action infringed on the right of Reservation Indians to make their own laws and be ruled by them.

Id. at 386, *quoting Williams, supra* at 220. See also *Mescelero Apache Tribe, supra* at 1270. The key to this phrase is the requirement for state actions. There is no state action involved in this case. Nor does the matter infringe upon any tribal laws. The Three Affiliated Tribes have declined jurisdiction over Non-Indians:

> *Jurisdiction.* The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties.

Three Affiliated Tribes' Tribal Code, Ch II §1 (a).

In fact, all Courts deciding this issue including this Court in *Felix, supra* and *Candelaria, supra* do not appear to be products of this Court's concern with problems of State power over reservation and modification of *Worcester* principles, but rather with the fact that State courts are, by their State Constitutions open to all persons for redress of grievances and Indians are persons. N.D. *Const.* Artl I, § 9 mandates:

> "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."

N.D. *Const.* Art. I, § 9 and the Fourteenth Amendment to the United States Constitution present a substantial barrier to denial of Court access to Indian Plaintiffs when the defendant is not an Indian. Access to Courts to settle disputes where there is no other remedy has been constitutionally protected by this Court. *See Boddie vs Connecticut,* 401 U.S. 371 (1970).

CONCLUSION

There are compelling reason why the petition for a Writ of Certiorai should be granted. The lack of an adequate forum for Reservation Indians to litigate matters arising on the reservation in their dealings with ousiders is very real. The denial of access to a Court system because of Indian status smacks in the face of the long history of Judicial protection of Reservation Indians.

Finally, no where can there be found support for the North Dakota Supreme Court's decisions. Every Court that has decided this issue, taken the liberty of posit dictum of the policy of acceptance of cases for review has taken the informed and proper position that Indians have access to State Courts to sue Non-Indians.

Dated: September, 1982.

Respectfully submitted,

John O. Holm
Attorney for Petitioners
17 Second Avenue West
Dickinson, North Dakota 58601

APPENDIX

APPENDIX A

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF WARD ss NW JUDICIAL DISTRICT

Three Affiliated Tribes of the Fort Berthold Reservation, Plaintiff,

vs.

Wold Engineering, P.C., a North Dakota Professional Corporation, Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush, Third-Party Defendant.

JUDGMENT OF DISMISSAL

Civil No. 46392

The Defendant Wold Engineering, P.C.'s Motion for Dismissal of the above entitled matter having been granted by the Court, and the Court having made its order for Judgment of Dismissal, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action be in all things dismissed, such dismissal to be without prejudice on the part of the Plaintiff to proceed further upon compliance by the Plaintiff with the appropriate statutes relating to jurisdiction of this matter.

Dated at Minot, North Dakota, this 18th day of January 1982.

/s/ _____

Clerk of District Court

APPENDIX B

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF WARD ss NW JUDICIAL DISTRICT

Three Affiliated Tribes of the Fort Berthold Reservation, Plaintiff,

vs.

Wold Engineering, P.C., a North Dakota Professional Corporation, Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush, Third-Party Defendant.

NOTICE OF APPEAL

Civil No. 46392

Please take notice that the above name Plaintiff, Three Affiliated Tribes of the Fort Berthold Reservation, by and through its attorney, John O. Holm, of Dickinson, North Dakota, does hereby take appeal from the Judgment of Dismissal from the District Court of and for Ward County of the Northwest Judicial District, dated January, 18, 1982.

That this appeal is hereby taken to the North Dakota Supreme Court.

That also it is the intention of the appellant not to request any transcripts in this matter due to the fact that any hearings or transcripts involved in this case do not relate to the subject matter of the Dismissal which was jurisdictional.

Dated this 22nd day of February, 1982.

BEYER & HOLM LAW OFFICES
17 Second Avenue West
Dickinson, North Dakota 58601
Attorneys for the Plaintiff

/s/ _____
John O. Holm

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Plaintiff and Appellant,

v.

WOLD ENGINEERING, P.C., a North Dakota Professional Corporation, Defendant, Third-Party Plaintiff, and Appellee,

v.

SCHMIDT, SMITH & RUSH, Third-Party Defendant and Appellee.

Civ. No. 10172.

Supreme Court of North Dakota

July 1, 1982.

Indian tribe brought action against non-Indian engineering firm for negligence in the design and construction of a water system for an Indian village located entirely within exterior boundary of Indian reservation. The District Court, Ward County, Northwest Judicial District, Wallace D. Berning, J., dismissed the complaint for lact of subject-matter jurisdiction, and tribe appealed. The Supreme Court, Erickstad, C. J., held that state district court was without jurisdiction over Indian tribe's complaint where Indian citizens of reservation had not voted to accept jurisdiction.

Affirmed.

1. Indians 27(2)

State district court lacked jurisdiction over Indian tribe's action against non-Indian engineering firm for negligence in design and construction of water system for Indian village located entirely within exterior boundary of Indian reservation where Indian citizens of reservation had not voted to accept jurisdiction of state courts, NDCC 27-19-01 et seq.; Indian Civil Rights Act of 1968, § 201 et seq., 25 U.S.C.A. § 1301 et seq.; Act August 15, 1953, § 1 et seq., 67 Stat. 588; Const. 1889, Art. 16, § 203.

2. Constitutional Law 249(1), 328

Denying Indians access to state court to sue non-Indians for civil causes of action arising on reservation did not deny Indians equal access to courts and equal protection rights where state constitutional and statutory provisions requiring Indians to consent to state court jurisdiction were enacted under explicit congressional authority. NDCC 27-19-01 et seq.; Indian Civil Rights Act of 1968, § 201 et seq., 25 U.S.C.A. § 1301 et seq.; Act August 15, 1953, § et seq., 67 Stat. 588; Const. 1889, Art. 16, § 203; Const. Art. 1, § 21; U.S.C.A. Const. Amend. 14.

Beyer & Holm Law Offices, Dickinson, for plaintiff and appellant; argued by John O. Holm, Dickinson

Bosard, McCutcheon & Rau by Hugh McCutcheon, Minot for defendant, third-party plaintiff, and appellee; argued by Gary H. Lee, Bismarck.

Pringle & Herigstad, Minot, for third-party defendant and appellee.

ERICKSTAD, Chief Justice

Three Affiliated Tribes of the Fort Berthold Indian Reservation (Affiliated) appealed from a judgment of the District Court of Ward County dismissing the complaint for lack of subject matter jurisdiction. The sole issue on appeal is whether or not the State court has subject matter jurisdiction over a civil action arising with the exterior boundaries of the Fort Berthold Indian Reservation in which Affiliated is the plaintiff and the defendants are non-Indians. The trial court held it had no jurisdiction. We affirm.

Affiliated contracted with Wold Engineering for the design and construction of a water system for the Four Bears Village. For purposes of our discussion, Affiliated is an Indian tribe. The Four Bears Village is located entirely within the exterior boundary of the Fort Berthold Indian Reservation. The enrolled residents of the Fort Berthold Indian Reservation have not consented to assumption of civil jurisdiction by the state of North Dakota, pursuant to the Indian Civil Rights Act of 1968 and

Chapter 27-19 of the North Dakota Century Code.

After the construction and installation of the water system, Affilated brought suit against Wold Engineering, claiming Wold negligently designed the water system.

[1] Affiliated has thoroughly briefed and outlined a historical perspective of Indian law in the United States. Essentially, its argument is that the state of North Dakota had limited jurisdiction to hear civil actions involving Indians on the Indian Reservation prior to Congress's enactment of Public Law 280 in 1953 and the amendment of that Act by Congress in 1968 through the Indian Civil Rights Act. The purpose of Public Law 280 was to facilitate the transfer of jurisdictional responsibility to the state. *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 505, 99 S.Ct. 740, 764, 58 L.Ed.2d 740 (1979). It permitted states to amend their constitutions or existing statutes to removed any legal impediments to the assumption of civil and criminal jurisdiction, and thereby to unilaterally assume jurisdiction over criminal and civil matters within the exterior boundaries of Indian reservations within the states taking such action. In 1968, however, with the enactment of the Indian Civil Rights Act, Congress amended Public Law 280 to permit states to take jurisdiction only upon bilateral action. Congress now permits those states which did not previously acquire jurisdiction to assume jurisdiction only upon consent of the affected Indian tribes.

Affiliated argues that under the Congressional scheme states retained the jurisdiction held before the enactment of Public Law 280 and the Indian Civil Rights Act of 1968. In essence, Affiliated argues that North Dakota retained residuary jurisdiction over actions brought by Indians against non-Indians for civil wrongs committed on Indian lands. *See, State ex rel. Iron Bear v. District Court,* 162 Mont. 335, 512 P.2d 1292 (1973). That argument would be more convincing had the legislature of North Dakota not, pursuant to Public Law 280, totally disclaimed jurisdiction over civil causes of action arising on an Indian reservation. *In re Whiteshield,* 124 N.W.2d 694 (N.D. 1963). In *Nelson v. Dubois,* 232 N.W.2d 54 (N.D. 1975),

with Justice Vogel dissenting, we rejected the concept of "residuary" jurisdiction. We adhere to that decision today.

In tracing the history of North Dakota's Indian civil jurisdiction we start with the Congressional Enabling Act, passed February 22, 1889, providing for the establishment of the states of Montana, North Dakota, South Dakota and Washington. Section 4, subdivision 2, of that Act provided that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." That section was incorporated into the original North Dakota Constitution as a "Compact with the United States." Art. XVI, § 203 N.D. Const. (1889).

In *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), this Court said that the contract between the United States and North Dakota created by Section 4, subdivision 2, of the Enabling Act and the disclaimer in Section 203 of the North Dakota Constitution, did not constitute a reservation by the United States of exclusive jurisdiction over civil causes of action between Indians residing on the reservation, if the actions did not involve the lands. Further, this Court said Public Law 280 had no application to states such as North Dakota which had assumed and exercised jurisdiction prior to the enactment of Public Law 280.

Under the authority of Public Law 280 the people of North Dakota in 1958 approved an amendment of Section 203 of the North Dakota Constitution which reads:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said *Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the*

> *acceptance of such jurisdiction as may be delegated to the state by Act of Congress,....*" Article XIII, § 1, N.D. Const. (Emphasis added).

In 1963 the North Dakota Legislature, under the authority of Public Law 280 and the Constitutional amendment to Section 203, enacted Chapter 27-19, N.D.C.C. That chapter permits state court's to take jurisdiction over "all civil causes of action which arise on an Indian reservation upon acceptance [of such jurisdiction] by Indian citizens...." § 27-19-01, N.D.C.C.

Because of the constitutional amendment and the enactment of Chapter 27-19, N.D.C.C., we overruled *Vermillion v. Spotted Elk,* 85 N.W.2d 432 (N.D. 1957), in *In re Whiteshield,* 124 N.W.2d 694 (N.D. 1963). We said the jurisdiction found in *Spotted Elk* was disclaimed by the people and the legislature of the state:

> "However, by the amendment of Section 203 of the North Dakota Constitution in 1958, and the passage of Chapter 242 of the Session Laws of 1963, the people and the legislature of the State have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action which arise on on Indian reservation, except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment." *In re Whiteshield,* 124 N.W.2d at 696.

Since *In re Whiteshield,* we have consistently held that we have no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction. *United States ex rel. Hall v. Hansen,* 303 N.W.2d 349 (N.D. 1981); *Nelson v. Dubois,* 232 N.W.2d 54 (N.D. 1975); *Gourneau v. Smith,* 207 N.W.2d 256 (N.D. 1973).[1] We therefore hold that the district court lacked jurisdiction to hear this action.

1. Affiliated argues that the dicta in *Rolette County v. Eltobgi,* 221 N.W.2d 645, 648 (N.D. 1974) stating that "Indians have the right to sue non-Indians in State Courts" is controlling in this action. However, such right does not exist where the subject matter of the action arose within the exterior boundaries of a reservation.

[2] Affiliated argues that denying Indians access to State court to sue non-Indians for civil causes of action arising on the reservation denies them equal access to the courts and their equal protection rights under Art. 1, Section 21 of the North Dakota Constitution and the Fourteenth Amendment to the United States Constitution, because non-Indian plaintiffs, allegedly are permitted access to State courts to sue non-Indian defendants over controversies arising within the exterior boundaries of Indian reservations.

In *Gourneau v. Smith,* 207 N.W.2d 256, 259 (N.D. 1973), we affirmed the trial court's judgment dismissing the plaintiff's complaint for lack of subject matter jurisdiction because the parties to the action were Indians. On appeal, the Indian plaintiff argued that she was denied equal protection of the laws because of the state's failure to hear her action. In response speaking through Justice Strutz we said:

> "The plaintiff has the same privileges as any other citizens in maintaining suits in the courts of this State. If the plaintiff were not an Indian and she attempted to bring an action against a defendant who was an enrolled Indian for personal injuries which she alleged had been suffered in an accident occurring on the Indian reservation, the State courts nevertheless would be without jurisdiction. *Williams v. Lee,* 358 U.S. 217,79 S.Ct. 269, 3 L.Ed.2d 251 (1959). Thus the plaintiff is not denied her right to bring such action in the State courts because she is an Indian; she is denied the right because the alleged tort was committed by an Indian on an Indian reservation, and because the Indians on that reservation have not accepted State jurisdiction in the manner provided for such acceptance. Neither is denial of acces to State courts for certain claims an infringement of the plaintiff's constitutional rights under Section 22 of the North Dakota Constitution. The Courts of this State are not at liberty to exercise jursidiction over civil actions against an Indian where the cause of action arises on the reservation. *Williams v. Lee, supra.*" 207 N.W.2d at 259.

The United States Supreme Court addressed the equal

protection argument in *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979). In *Confederated Bands,* the Court upheld Chapter 36 of the 1963 Washington laws against constitutional attack. Through that law, "the Washington Legislature obligated the state to assume civil and criminal jurisdiction over Indians and Indian territory within the state, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands without the request of the Indian tribe affected. Ch. 36, 1963 Wash. Laws." (Footnote omitted). *Id.,* 439 U.S. at 465-467, 99 S.Ct. at 743-44. The Court first held that the scheme adopted by the Washington Legislature was within the scope of the authorization of Public Law 280. It then addressed the equal protection argument as follows:

> "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari,* 417 U.S. 535, 551-552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub.L. 280. And many of the classifications made by Chapter 36 are also made by Pub.L. 280. Indeed, classification based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, *e.g., United States v. McBratney,* 104 U.S. 621, 26 L.Ed. 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, is the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.

See, *e.g.*, *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979).

Likewise, the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its fedral power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted. We therefore find no equal protection violation of the Constitution of either the state or the United States and for the reasons stated in this opinion, affirm the judgment of the district court.

VANDE WALLE, PEDERSON, PAULSON AND SAND, JJ., concur.

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